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No. 362.

IN THE

Supreme Court of the United States

October Term, 1958.

RAYMOND JEREAN KOLLER and
MARTIN SILVERBROOK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The first opinion of the District Court (R. 10, 11) is reported at 143 F. Supp. 154. The later memorandum of the District Judge (R. 17) is unreported. The opinion of the Court of Appeals (R. 18-24) is reported at 255 F. 2d 865.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 17, 1958. Jurisdiction of this Court was invoked under 28 U. S. C. 1254(1) on a Petition for Writ of Certiorari filed September 13, 1958, and granted November 17, 1958 (358 U. S. 892).

STATUTES INVOLVED.

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 780, 50 U. S. C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U. S. C. (1952 ed.) 489(b), provides in pertinent part:

> "(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder ——
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the

United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be."

Act of June 25, 1948, 62 Stat. 974, 28 U. S. C. 2462, provides as follows:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made therein."

QUESTIONS PRESENTED FOR REVIEW.

Does the Civil Statute of Limitations, 28 U. S. C. Sec. 2462, prohibiting the institution of suits by the United States to recover civil fines, penalties or forfeitures after five years from the date of the occurrences complained of, bar action under the Surplus Property Act of 1944, Sec. 26 (b) (1), to recover Six Thousand ($6,000.) Dollars for the filing of three false certificates by petitioners more than nine years before actions were started?

Do the provisions of Section 26 (b) (1) of the Surplus Property Act of 1944 (40 U. S. C. Sec. 489), imposing upon a person committing a prohibited act the burden of paying

to the United States the sum of Two Thousand ($2,000.) Dollars for each such act and double the amount of any damage which the United States may have sustained, constitute a civil fine, penalty or forfeiture?

STATEMENT OF THE CASE.

The United States instituted a civil suit under Section 26 (b) (1) of the Surplus Property Act of 1944 in the United States District Court for the Eastern District of Pennsylvania against petitioners and others on the twelfth day of May, 1955. The complaint, as amended, charged that petitioners took advantage of their status as veterans to buy three surplus motor vehicles from the War Assets Administration for the benefit of a non-veteran, and in so doing filed three false certificates relating to their ownership of a business in which the vehicles were to be used (R. 5, 9).

The three acts complained of occurred on July 12, 1945, March 15, 1946 and June 3, 1946, approximately nine years before the filing of the complaint (R. 9). The government demanded the sum of $2,000.00 for the single fraudulent act alleged to have been committed by petitioner Silverbrook, and $4,000.00, in the aggregate, for the two alleged false certificates filed by petitioner Koller (R. 8). While a claim for double damages is also included in the complaint, the record below is devoid of any allegation or proof of actual damages. Both petitioners had been indicted and had entered pleas of guilty in 1950 for the identical acts, and each had been fined at that time.

On April 3, 1957, the United States filed motions for summary judgments against petitioners, setting forth the convictions and demanding the entry of judgment in the sum of $2,000. "in forfeitures" against Silverbrook (R. 13) and $4,000. "in forfeitures" against Koller (R. 14). These mo-

tions were subsequently amended by the United States to eliminate therefrom the words "in forfeitures" (R. 15, 16).

Petitioner Silverbrook had previously resisted the efforts of the United States by a motion to dismiss the complaint on January 27, 1956, raising the question of limitations (R. 10). Honorable C. William Kraft, Jr., District Judge, denied this motion to dismiss (R. 10) and petitioner answered responsively again raising limitations (R. 12).

Upon the filing of the government's motions for summary judgment, petitioners again resisted in reliance upon the Statute of Limitations (R. 15). The amended motions of the government were "reluctantly" granted on August 5, 1957, and judgments entered in favor of the United States against Silverbrook for $2,000. and against Koller for $4,000. (R. 17).

Petitioners promptly appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on July 17, 1958 (R. 24, 25). Petitioners filed their petition for a writ of certiorari on September 13, 1958, which was granted on November 17, 1958.

SUMMARY OF ARGUMENT.

The holding of the Court below that suits under Section 26 (b) (1) of the Surplus Property Act to recover $2,000 for each of petitioners' three false certificates are not subject to the five year limitations provisions of Title 28 U. S. C. §2462 is founded upon a misapprehension and unjustified extension of the decision of the Supreme Court in *Rex Trailer Company v. United States*, 350 U. S. 148. That decision, as did *United States ex rel. Marcus v. Hess*, 317 U. S. 537, merely enunciated the philosophy that civil suits for forfeitures under the False Claims Act and the Surplus Property Act do not violate the prohibition of the 5th Amendment against double jeopardy where the defendants

had previously been indicted for the same offense. The Court below mistakenly construed *Rex Trailer* to deny the possibility of 26 (b) (1) constituting a *civil* penalty, subject to limitations. (Cf. *Erie Basin Metal Products v. United States*, 150 F. Supp. 561.)

The Congress understood and intended that Limitations would apply to 26 (b) (1) as it does to the identical suit under the False Claims Act. It specifically avoided referring to 26 (b) (1) as "liquidated damages" as was done in 26 (b) (2) and (3), and provided for an additional remedy in 26 (b) (1) of double the actual damages sustained. *Marcus v. Hess* had established the right of the government to collect the $2,000 forfeiture irrespective of any actual damages. (See also, *United States v. Rohleder* (C. A. 3), 157 F. 2d 126.)

House Report 308, 80th Congress, 1st Session, clearly manifested Congressional understanding that the $2,000 stipend was a forfeiture to be sued for in a civil action (28 U. S. C. 2461) and so interpreted the holding in *Marcus v. Hess*. This intent is in line with an unbroken history of almost one hundred years of judicial interpretation of suits under the False Claims Act, including the 1958 decisions in *Rainwater v. United States*, 356 U. S. 590, and *United States v. McNinch*, 356 U. S. 595.

Further, Congressional intent to bar suits for $2,000 and double damages after the passing of a reasonable period of time is demonstrated by the self-contained limitations section of the False Claims Act which has remained unrepealed since its enactment in 1863. Failure to include similar circumscription of the identical remedy under the Surplus Property Act does violence to that legislative plan.

Under the common law, recoveries unrelated to actual damages have always been a civil penalty. As well, double or treble damages received the same construction. *A fortiori*, the combination of the two remedies is manifestly a civil penalty.

ARGUMENT.

I. THE ISSUE.

The sole question presented for the consideration of the Supreme Court is whether a suit under Section 26 (b) (1) of the Surplus Property Act, demanding $2,000. and double the amount of any damages sustained by the government by reason of the presentation of an application containing a false statement by a veteran, is a suit for a civil fine, penalty or forfeiture within the meaning of the Statute of Limitations (28 U. S. C. Sec. 2462). If such a claim is a civil fine, penalty or forfeiture, then the action is barred by limitations, not having been brought within five (5) years from the date of the commission of the offense charged.[1] We submit that it is barred.

II. A "PENALTY" DEFINED.

A penalty has been defined as:

> "Any extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered."
>
> *Schick v. U. S.*, 195 U. S. 65;
>
> *Huntington v. Attrill*, 146 U. S. 657;
>
> *Schaefer v. H. B. Green Transportation Lines*, 232 F. 2d 415, 418.

A penalty is distinguished from compensatory damages by its purpose and relation to actual loss as follows:

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[1] The Suspension of Limitations Act (18 U. S. C. 3281) has no effect on the issue since suit was instituted more than five years after December 31, 1949.

"By damages is understood the indemnity . . . which the law gives to the injured party for the breach of a contract or a duty. . . . Such damages are precisely commensurate with the injury received . . . A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by the law for its violation. It has no reference to the actual loss sustained . . ."

23 Am. Jur., Section 29, p. 625;
In Re Caponigra, 193 F. 291, 292.

Where the sum exacted bears no relation to the actual loss sustained, or is a multiple of that sum, it is a penalty regardless of the appellation applied to it.

Helwig v. United States, 188 U. S. 605, 613.

Thus, the sums recoverable under the Agricultural Adjustment Act,[2] the Sherman and Clayton Acts,[3] Securities Exchange Act,[4] the National Labor Relations Act,[5] the Emergency Price Control Act,[6] and many others are penalties.

Basically, from both a practical and an historical point of view, any statute authorizing recoveries measured by a multiple of the actual loss sustained is penal in character.[7]

"Penal" is much broader in its implications than "criminal", and a "penalty" may be either civil or criminal.[8]

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[2] **Western Fruit Growers v. U. S.**, 124 F. 2d 381

[3] **Harrison v. Paramount Pictures** (D. C. Pa. 1953), 115 F. S. 312, **affd.** 211 F. 2d 405, **cert. den.** 348 U. S. 828, 75 S. Ct. 45, 99 L. Ed. 653.

[4] **Wogahn v. Stevens**, 236 Wisconsin 122, 294 N. W. 503.

[5] **NLRB v. Continental Oil Co.**, 121 F. 2d 120, 125, **Porter v. Montgomery**, 163 F. 2d 211, 215.

[6] **Bowles v. Farmers National Bank**, 147 F. 2d 425, 428.

[7] **Republic Steel v. NLRB**, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. 6.

[8] E. g., "penal code," "penal institution," etc., but c. f. "penal sum" in mortgage obligations. See **Banana Distributors v. United Fruit Company** (S. D. N. Y.), 158 F. Supp. 160, and cases therein cited and discussed, **infra** p. 11.

By agreement the parties to a contract may stipulate, in lieu of the ordinary measure of damages, a specific sum in liquidation of the damages to which an aggrieved party shall be entitled in the event of default, but in these situations such amount must bear a reasonable relation to the value of the subject involved and be exclusive of all other measures." Whether the remedy constitutes liquidated damages is a matter of expressed intent and, since the device is in contravention of basic legal remedial precedents, is subject to careful scrutiny. In the several states, where the sum is excessive, or disproportionate to actual loss, it is deemed penal in spite of the designation of the sum as "liquidated damages" by the parties.

Whether or not *legislative* designation of a specified sum as "liquidated damages" in a statute is subject to judicial scrutiny need not be decided here, since the Congress saw fit *not* to apply that designation to the provisions of 26 (b) (1), as it did in 26 (b) (2) and 26 (b) (3).[10]

Finally, where the *purpose* of the liability imposed upon the defendant or wrongdoer is not to restore the *status quo*, but rather to effect legislative enforcement of the law by the imposition of a pecuniary deterrent to punish the offender, such provisions manifestly constitute forfeitures or penalties of a civil nature. *Schick v. United States*, 195 U. S. 65, 24 S. Ct. 826, 49 L. Ed. 99.

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[9] **Trans World Airlines, Inc. v. Travelers Indemnity Company, et al.** (C. A. 8), decided Jan. 5, 1959, Civil Action No. 16,041, as yet unreported officially, quoting with approval 15 **Am. Jur.**, Sec. 264, p. 269, as follows: " 'The effect of a clause for stipulated damages in a contract is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach . . . [T]he amount named forms . . . the measure of damages in case of a breach, and the recovery must be for that amount. No other or greater damages can be awarded, even though the actual loss may be greater or less.' "

[10] Congress specifically designated the provisions of 26(b) (2) and (3) as "liquidated damages," but did not apply the term to 26(b)(1). All rules governing construction of legislation demand judicial differentiation between the three sections rather than the unification urged by the government.

Considering the $2,000 stipend above, an amount imposed without respect to the amount of damages sustained, the recovery of such amount either inures to the Government in the form of liquidated damages or a civil penalty. This $2,000 stipend is a civil penalty for the following reasons:

As stated previously, Congress in enacting Section (b) (1) did not denominate the recovery of the $2,000 stipend as liquidated damages. If Congress intended Section (b) (1) to be an action for the recovery of liquidated damages, Congress would have denominated it a recovery for liquidated damages with the same specificity as it did in Section (b) (2) and (b) (3).

The recovery of the $2,000 stipend does not bar the Government from recovering actual damages in the same action, for the same alleged wrong, but, in fact, Section (b) (1) allows the Government to recover double the damages actually sustained by it. It is a basic tenet of Anglo-American jurisprudence, which needs no citation, that the courts will not condone or enforce multiple recoveries for the same alleged wrong; therefore, if the Government recovers this $2,000 as liquidated damages, then it would be automatically and forever barred and estopped from recovering actual damages for the same alleged wrong. *Trans World Airlines, Inc. v. The Travelers Indemnity Company* (*supra*, n. 9). To contend that the $2,000 stipend allowed by Section (b) (1) of the Surplus Property Act constitutes liquidated damages, when actual damages are neither liquidated nor dissolved, usurps this axiom and defies common sense, common law and the adjudged cases.

Before stipulated sums will be upheld by a court as liquidated damages, the relation to actual damages must be reasonable and not oppressive. The $2,000 stipend which Section 26 (b) (1) of the Act allows as a recovery and which the Government recovered herein is so greatly disproportionate in this action to the actual damages, inasmuch as no actual damages were sustained or proved, that it cannot be upheld as liquidated damages.

Furthermore, as the District Court ruled in the case at bar, the $2,000 stipend for each violation of the Act may be imposed upon a defendant irrespective of the fact that the Government sustained no damages whatsoever. However, under the common law, liquidated damages are not recoverable as such unless and until the plaintiff has suffered some types of damages, other than nominal damages. The damages suffered by a party in this instance may not be used as a measure of recovery, but the sufferance of these damages is a condition precedent to considering a pre-determined, set sum as liquidated damages, instead of a civil penalty. In the case at bar, the Government neither sustained nor proved any actual damages and the recovery which the Government effectuated herein was the recovery of a civil penalty.

Independent of the fact that the $2,000 stipend is a civil penalty, the imposition of double damages allowed by Section (b) (1) of itself constitutes a civil penalty. In order to recover the double damages which Section (b) (1) allows, the Government must allege and prove the actual damages which it sustained. Any recovery, doubling the actual damages sustained by the Government, does not compensate the Government for the damages which it may have sustained but inures to the Government in the form of a civil penalty.

The most cogent statement of this principle is contained in the case of *Banana Distributors v. United Fruit Company* (S. D. N. Y.), 158 F. Supp. 160, wherein the District Court in that instance reviewed and analyzed all the decisions on the issue whether the treble damage features of the antitrust laws were compensatory or civilly penal in nature and held that "the treble damage provisions of the antitrust laws are, both from a historical as well as from a practical viewpoint, penal in nature" (l. c. 167).

In elaborating further and quoting extensively from numerous cases, the Court stated:

"An analysis of the statutory provisions upon which the plaintiffs sue, clearly indicates that *the actual loss*

sustained by plaintiffs is only a base upon which the sanction of treble damages is superimposed. Thus, the fundamentally penal character of the right of action is evident" (l. c. 163). (Italics added.)

"In Fleitman v. Welsbach Street Lighting Co., 1916, 240 U. S. 27 at page 29, * * *, Holmes, J., described *a private Sherman Act case as involving 'a penalty of triple damages'* (l. c. 163). (Italics added.)

"In United States v. Standard Ultramarine and Color Company, D. C. S. D. N. Y. 1955, 137 F. Supp. 167, Judge Weinfeld wrote:

' * * * Another purpose in permitting an injured party to recover three-fold his actual damage was that *substantial verdicts against the wrongdoer would constitute punitive sanctions*—to act as a deterrent against a repetition of the offense and to serve as a warning of potential violators' (l. c. 163-164). (Italics added.)

" * * * in a case entitled American Banana Co. v. United Fruit Co., 153 F. 943, Judge Lacombe said:

' * * * it seems entirely clear that this is a penal action. It is instituted by a person who claims to have been injured by the unlawful acts of defendant *to recover, not only the damages which will compensate him for any loss he has sustained, but also a penalty of twice as much again, which represents no damages, but only a fine imposed for bad conduct*' (l. c. 164). (Italics added.)

" * * * in 1955, Lyons v. Westinghouse Electric Corporation, 222 F. 2d 184, certiorari denied 1955, 350 U. S. 825, * * *, a private triple damage action under the anti trust acts, Learned Hand, Circuit Judge, wrote:

' * * * The remedy provided is not solely civil; *two thirds of the recovery is not remedial and inevitably presupposes* a punitive purpose' (l. c. 164). (Italics added.)

" * * * impact of a suit under the federal antitrust acts is clearly upon the defendants. The defendants pay, and as to them a penalty is exacted" (l. c. 164).

"In Schiffman Bros., Inc. v. Texas Co., 7 Cir. 1952, 196 F. 2d 695, * * * , Judge Lindley stated:

'*Two-thirds of the judgment is the penalty imposed by Congress and automatically attaches to the damages found.* * * * And in H. J. Jaeger Research Laboratories v. Radio Corp., 3 Cir. 90 F. 2d 826, * * *, the third circuit said: "The Sherman Act created a new tort damage right for damages actually suffered, *but also imposed a statutory trebling penalty*" ' (l. c. 168). (Italics added.)

"In Sun Theatre Corp. v. R K O Radio Pictures, Inc., 7 Cir., 1954, 213 F. 2d 284, Judge Lindley discussed the question whether a plaintiff could avoid the effect of a penalty statute of limitations by suing only for actual damages and waiving the remaining two-thirds. On page 287 he said:

'The statute is explicit; the only remedy provided therein is "threefold the damages" sustained. *Giving to this language its plain meaning, we think the only permissible interpretation is that the remedy afforded is treble damages, penal in nature and susceptible therefore to all restrictions surrounding an action of such nature.* * * * "The verdict should represent actual damages sustained, and *two thirds of the judgment is a penalty which Congress has seen fit to impose* * * * "' " (l. c. 169). (Italics added.)

Furthermore, since each of the recoveries under Section (b) (1), namely, double the actual damages sustained and a $2,000 arbitrary stipend unrelated to the amount of actual damages sustained, taken separately, constitutes a civil penalty, the recovery of both of these unquestionably constitutes a civil penalty.

In addition, since the recovery is sought from both the veteran and the individual for whom he made the application, the Government conceivably can recover $4,000 and four times the damages provable for one false certificate.

To carry the thought one step further, if the defendant happened to be a partnership composed of two or more individuals, the recovery can continue to pyramid in multiples of $2,000 and double the damages sustained.

In *United States v. Witherspoon* (C. A. 6, 1954), 211 F. 2d 861, the court examined and commented on the definitions of damages and penalties as follows:

> " 'By damages is understood the indemnity, or composition in money, which the law gives to the injured party for the breach of a contract or a duty. In theory, such damages are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. 23 Am. Jur. 625. In American Fidelity & Casualty Co. v. G. A. Nichols Co., 10 Cir., 173 F. 2d 830, 833, it is stated: "The term 'penalty' is commonly used in the sense of an extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged as distinguished from compensation for the loss suffered by the injured person." *The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property, without regard to its value, is a provision for a penalty. Its purpose is, obviously, to punish an offense against the public justice, in addition to double the amount of all damages suffered by the government.'*
>
> "The District Court held that the complaint disclosed that the government's action was for a penalty, rather than for compensation for damages suffered as a result of appellee's alleged fraud, and with this conclusion we concur." (Italics added.)

While the government asserts no actual pecuniary loss in the instant case, its request for relief demands the sum of $2,000 and double the amount of actual loss for each false certificate. The basis of its claim is so clearly a penalty or forfeiture that the attorney for the government, in the original motion for summary judgment against Silverbrook, moved the court to enter judgment

> "in favor of the plaintiff and against the defendant of liability for the unlawful acts recited in all counts of criminal indictment number 15993, and a $2,000. *forfeiture* . . . for the unlawful acts recited in the one count of said indictment, or a total of $2,000. in *forfeitures*." (Italics added.)

The same language was employed in the motion against Koller (R. 13, 14).

III. THE LAW BEFORE REX TRAILER.

Prior to the decision in *Rex Trailer Company v. United States*, 350 U. S. 148 (decided Jan. 9, 1956), there were few reported decisions on the narrow issue here presented, but with the exception of *United States v. Weaver* (C. A. 5), 207 F. 2d 796, they uniformly considered the $2,000 sum in 26 (b) (1) a civil penalty.[11]

In *United States v. Kolsky* (*supra*, n. 11), the District Judge abruptly dismissed the contention of the government that the action was not for a penalty or forfeiture in the following language (p. 360-361):

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[11] **U. S. v. Witherspoon** (C. A. 6, 1954), 211 F. 2d 858,
U. S. v. Comstock Extension Mining Co. (C. A. 9, 1954), 214 F. 2d 400;
U. S. v. Kolsky (E. D. Pa. 1955), 137 F. Supp. 359;
U. S. v. Covollo (E. D. Pa. 1955), 136 F. Supp 107;
U. S. v. Weaver (N. D. Ala., S. D., 1952), 107 F. Supp. 963, rev. 207 F. 2d 796.

> "The language of the Section, (Sec. 26 (b) (1) of the Surplus Property Act) . . . so clearly shows that a penalty was intended that a discussion thereon is deemed unnecessary."

Significantly, *Witherspoon* (*supra*, n. 11), decided after *Weaver*, ignored the prior decision of the sister Circuit and held the sanction a penalty.

While, by reason of its relatively short history, there have been few reported decisions on Limitations under the Surplus Property Act, since the enactment of the False Claims Act, 31 U. S. C. 231, in 1863, providing for the same statutory stipend as the Surplus Property Act in virtually identical language, there exists nearly one hundred years of judicial interpretation, with almost complete unanimity, construing the $2,000 clause as a penalty.[12]

As the Court of Appeals stated in the landmark case, *United States v. Shapleigh*, (*supra*, n. 12):

> ". . . The government might have proceeded by indictment to punish him for them under Section 5438. If it had done so, its case must have been proved beyond a reasonable doubt. It elected to proceed under Section 3490, by a civil suit, *to recover over $300,000. in penalties, to punish the defendant for the same crime. The penalties sought to be inflicted by the latter pro-*

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[12] **U. S. v. Duggan** (C. A. 8, 1954), 210 F. 2d 926;
U. S. v. Rohleder (C. A. 3, 1946), 157 F. 2d 126;
U. S. v. Dawes (C. A. 7, 1945), 151 F. 2d 639 (cert. den.);
U. S. v. Weekly Publications (C. A. 2, 1944), 144 F. 2d 186;
U. S. v. Baker-Lockwood (C. A. 8, 1943), 138 F. 2d 48 (rev. other grounds);
U. S. v. Bausch & Lomb Optical Co. (C. A. 2, 1942), 131 F. 2d 545 (aff'd and rehearing denied);
U. S. v. Fahey (C. A. Dist. of Col., 1941), 121 F. 2d 28 (cert. den.);
U. S. v. Mercur Corp. (C. A. 2, 1936), 83 F. 2d 178 (cert. den.);
U. S. v. Shapleigh (C. A. 8, 1893), 54 F. 126;
Pooler v. United States (C. A. 1, 1904), 127 F. 519, as well as District Court decisions too numerous to mention.

ceeding are far heavier than any that the court would probably have inflicted under the former." (Italics added.)

" . . . The action at bar is a civil suit in form; but . . . the government sought to punish this defendant for felonies by recovering the *penalty of double damages and $2,000. for each offense.*" (Italics added.)

This principle has been clearly enunciated by the Supreme Court in *Huntington v. Attrill, supra,* and in *Helwig v. United States* (1903), 188 U. S. 605, 47 L. Ed. 614, 23 S. Ct. 427, and, we submit, is still the basic law of our land today. It is largely by reason of the decision of this Court in *Rex Trailer v. United States* that a doubt has penetrated the solidarity of one hundred years of judicial certainty.

IV. THE IMPACT OF REX TRAILER.

In denying petitioner Silverbrook's motion to dismiss the complaint as barred by the Statute of Limitations (28 U. S. C. 2462), the district judge stated as follows (R. 10, 11):

"The critical question is whether the recovery sought are penalties or damages. Defendants' argument is strongly persuasive that the sum of Two Thousand Dollars ($2,000.) claimed for each violation, in addition to double damages, is a civil penalty rather than damages. However, in Rex Trailer Company v. U. S., 350 U. S. 148, the Supreme Court, discussing the difference between civil remedies and criminal remedies, did sufficiently indicate that it construed the provisions of Section 26 (b) (1) to authorize 'the recovery of a lump sum in damages.'"

Mr. Justice Clark stated the issue in *Rex Trailer* as follows:

"*Petitioner's sole contention is that 26 (b) (1) provides a criminal penalty and, having once been convicted and fined for the transactions in question, it cannot again be subject to punishment.* The only question for our decision, then, is whether 26 (b) (1) is *civil* or *penal*, for 'Congress may impose both a *criminal* and *civil sanction* in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense' * * * We conclude that the recovery here is *civil in nature.*" (Italics added.)

Mr. Justice Clark continued, referring to the case of *United States ex rel. Marcus v. Hess*, 317 U. S. 537, which

"involved a provision of the False Claims Act, R. S. Sec. 5438, 3490, 31 U. S. C. Section 231, essentially the equivalent of Sec. 26 (b) (i).

"The False Claims Act provides that the defrauder 'shall forfeit and pay to the United States the sum of $2,000. and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; *and such forfeiture and damages shall be sued for in the same suit.* * * *'

"The Surplus Property Act, which employed virtually identical language in Sec. 26 (b) (1), was enacted on October 3, 1944. Under these circumstances it would be difficult to say that these words which provided a *civil remedy* in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

In conclusion, Mr. Justice Clark stated:

"It cannot be said that the measure of recovery fixed by Congress in the Act is so excessive that it transformed what was clearly intended as a *civil remedy into a criminal penalty.*" (Italics added.)

The need for clarification of the doubts created by *Rex Trailer* is made abundantly clear from an examination of the quoted sections of the opinion. The issue involved was double jeopardy as defined in the 5th Amendment, i. e., was the proceeding *criminal or civil in nature*; not does 26 (b) (1) provide for *compensatory* or *punitive* damages. The respondent urges that Mr. Justice Clark's concluding statement has created the inference that, of necessity, there can be no co-existence in the law of *civil* penalties and *criminal* penalties, but, rather, that all penalties are criminal, and if the action be civil in nature and form, it is of necessity compensatory. In effect, maintains the government, the dictum in *Rex Trailer* denies the possibility of a *civil penalty*. This inference, we submit, is erroneous and we urge upon the Supreme Court that it reaffirm the basic principles relating to the recovery of civil penalties and forfeitures for violations of the laws of Congress.

Since the decision in *Rex Trailer*, the Court of Claims, in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, after an exhaustive review of the entire situation created by *Rex Trailer*, held that the Statute of Limitations *was* applicable to such a suit. The court (referring to *Marcus v. Hess* and *Rex Trailer*) stated as follows:

> "In both of these cases the contractors asserted that, since they have been convicted criminally for the frauds perpetrated, they would be placed in double jeopardy if the government's claim for a money judgment against them should be sustained. That was the only issue before the Supreme Court and the only one it decided. It said that the claims under the False Claims Act, in one case, and under the Surplus Property Act in another, the Fraud section of which is substantially the same as the Contract Settlement Act, *were civil and not criminal actions and, hence, the plea of double jeopardy could not be sustained.* Section 2462 relates to an action for a '*civil* fine, penalty or forfeiture.' (Italics supplied.) (Sic) *The Supreme*

Court did not say that the Surplus Property Act and the False Claims Act did not impose civil penalties; it merely said they were not criminal penalties.

"We think that both acts impose penalties to be recovered by the government in a civil action. The purpose could not have been to save the government the necessity of proving actual damages for the fraud committed, as a liquidated damages provision, because the amount of the recovery was double the damages actually sustained. Damages had to be proven. *It was the purpose to make the consequences of fraud so great as to deter the commission of it.* If fraud was attempted, but was not accomplished, in which case there would be no actual damage, except the expenses of uncovering the fraud, the penalty was 25% of the amount sought to be wrongfully secured. If the fraud was successful, the amount wrongfully secured was to be refunded and, in addition, double the amount of the actual damage was recoverable, plus $2,000, for each fraudulent act.

"This was not a provision for liquidated damages damages had to be proven to recover under the double damages provision. The recovery of simple damages would not have been a penalty, but the recovery of double damages is * * *.

"Sedgwick, in his work on damages (Section 405), lays down this guide for distinguishing between a penalty and liquidated damages:

'Whenever the damages are evidently the subject of calculation and adjustment between the parties and a certain sum was agreed upon and intended as compensation, *and is in fact reasonable in amount*, it will be allowed by the court as liquidated damages. (Italics added.)' (Sic).

"Simple damages are compensatory: double damages, of necessity, are a penalty.

"Section 2462 of 28 U. S. C. provides that 'an action,

suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

"*If this section does not apply to the character of action asserted by defendant in its counter-claim*, we can conceive of no action to which it could apply.

"*The applicability of Section 2462 was not before the Court; nor was the question of whether the provisions for double damages and Two thousand dollars ($2,000.00) for each fraudulent act, was a provision for a penalty or for liquidated damages.* The sole question was whether the provision was civil or criminal in nature. The court said, at the top of page 153, that 'the government's recovery here is liquidated-damage provisions which fix compensation for anticipated loss'; but it *did not say it was not a penalty as that word was used in Section 2462. Upon further consideration, we think it was.*" (Italics added.)

The government failed to appeal this decision, indicating considerable weakness in its position. It suffered the same defeat a short while later in *Goggin v. United States*, 152 F. Supp. 78 (Ct. Cl. 1957), in which Judge Madden, dissenting in *Erie Basin*, wrote the opinion for the court. Again, the government failed to appeal.

Subsequent to *Erie Basin* and *Goggin*, the 7th Circuit had 26 (b) (1) under consideration in *U. S. v. Rubin* (C. A. 7, 1957), 243 F. 2d 900. While the question of limitations was not the problem before the court, the plain language employed throughout strongly indicated the clear understanding that the $2,000. stipend was a penalty. The court began its opinion in the following language:

"In the civil complaint in this case the United States sought to recover from defendant the *civil penalties* fixed by Title 40, U. S. C. A., par. 489. . . .

"The government complains because . . . . the court

treated all such purchases upon each application as one transaction and assessed for all of them only one *penalty* of $2,000. This, it insists, was error because, on its theory of the case, each purchase constituted a separate act subjecting defendant to liability for the *penalty*. Hence, the government says there should have been judgment for a *penalty* for each of the different purchases, some fourteen in number, or the alternate remedy of double the value of the merchandise procured.

"We have observed the language of para. 26 (b) of the Surplus Property Act. *While there are no precedents, we think the situation is not lacking in analogy to others where penalties have been assessed.* * * * *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443; * * * *United States v. Rex Trailer Co.*, 7 Cir., 218 F. 2d 880, affirmed 350 U. S. 148, 76 S. Ct. 219, 100 L. Ed. 149. The reasoning in these and other decisions, dealing with other statutes, makes it clear, we think, *that it was the intent of Congress to require assessment against defendant of a penalty of $2,000 for each overt act performed by him in pursuance of the conspiracy with the veterans into which he had entered.*" (Italics added.)

On May 26, 1958, the Supreme Court of the United States had occasion to decide two companion cases involving the False Claims Act.[13] In *Rainwater et al. v. United States of America* (*supra*, n. 13), Mr. Justice Black began the opinion of the Court in the following language:

"This case involves two related suits by the United States to recover damages and *forfeitures* under the Civil provisions of the False Claims Act. * * * "

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[13] **Rainwater v. U. S.**, 356 U. S. 590, 2 L. Ed. 2d 996, 78 S. Ct. 946; **U. S. v. McNinch**, 356 U. S. 595, 2 L. Ed. 2d 1001, 78 S. Ct. 950.

He continued:

> "We are aware that the civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in §5438 of the Revised Statutes of 1878,[8] and that according to familiar principles the scope of these provisions should be confined to their literal terms. Yet even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.'" United States v. Raynor, 302 U. S. 540, 552, 82 L. ed. 413, 415, 58 S. Ct. 353.

Footnote 8 referred to in the above quotation reads as follows:

> "8. *Originally Congress provided both criminal and civil sanctions in the same statute.* 12 Stat. 696. By the Revised Statutes of 1878 *the civil sanctions were codified as §3490*, while the criminal provisions were separately enacted as §5438. *Section 3490 permitted the Government to recover forfeitures and damages* for those acts prohibited by §5438, e. g., submission of false or fraudulent claims 'against the Government of the United States, or any department or officer thereof.' See note 1, supra. The civil provisions as enacted in §3490 have never been altered."
> (Italics added.)

Again, in the opinion in *United States v. McNinch* (*supra*, n. 13), Mr. Justice Black stated as follows:

> "This case was argued with Rainwater v. United States, 2 L. ed. 2d 996, also decided today. It involves three separate actions by the Government to recover damages and *forfeitures* under the False Claims Act.
> * * *
>
> "In Cato and Toepleman the District Court found the defendants had submitted false claims for crop support loans to the Commodity Credit Corporation,

> and entered judgment in favor of the Government for the *forfeitures* provided by the False Claims Act. * * * *"
>
> . . . . . "But it must be kept in mind, as we explained in Rainwater, that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.
>
> * * * * * * * * *
>
> "The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury."

A careful consideration of the aforegoing language as well as that found in *Rubin* and *Erie Basin*, *supra*, renders inescapable the conclusion that Congress contemplated the precise situation encompassed in 26 (b) (1) when it enacted Sections 2461 and 2462 of Title 28.[14]

The government relies upon *Marcus v. Hess*[15] as a foundation for the position that the comparable provisions of the False Claims Act are purely compensatory and not in any sense a civil penalty or forfeiture. The issue in *Marcus*, as in *Rex Trailer*, was double jeopardy, not limitations, and

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[14] Cf. **U. S. v. Tieger** (C. A. 3, 1956), 234 F. 2d 589, **cert. den.**, 352 U. S. 941;
U. S. v. Cochran (C. A. 5, 1956), 235 F. 2d 131, **cert. den.**, 352 U. S. 941, 1 L. Ed. 2d 237, 77 S. Ct. 262;

[15] 317 U. S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943).

the opinion reflects the conclusion that the subject provisions did not twice place the defendant in jeopardy for the same offense. However, Mr. Justice Black, writing for the Court clearly indicates that the $2,000 stipend, though not criminal, *is* a civil penalty or forfeiture.

At page 546, Justice Black quoted with approval from the Senate Sponsor of the Bill as follows:

> " 'Even the district attorney, who is required to be vigilant in the prosecution of such cases, may also be the informer, and entitle himself to one-half of the *forfeiture* under the qui tam clause and to one-half of the double damages which may be recovered against the persons committing the act.' " (Italics added.)

And, again, at page 552, Mr. Justice Black stated as follows:

> "Section 3490 requires that the $2,000 forfeit be paid for doing 'any' of the acts prohibited by 5438."

In his concurring opinion, Mr. Justice Frankfurter seems to have foretold the problem which was to arise, compounded by *Rex Trailer*, sixteen years later, by reason of the use of generic phraseology when he said (p. 554):

> "Such dialectical subtleties may serve well enough for purposes for explaining away uncritical language in earlier cases . . . but they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment. . . .
>
> "Punitive ends may be pursued in civil proceedings. . . .
>
> "In my view the proper approach to the problem of double jeopardy in a situation like this, where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is . . . that where two such proceedings merely carry out the

remedy which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed in separate suits instead of in a single proceeding."

We urge that the individual rights of the citizens are equally affected by the application of the Statute of Limitations enacted by Congress to circumscribe the belated imposition of monumental assessments.

While certain language in the opinion in *Marcus* seems to lend support to the position of the government, great significance cannot attach to such language where the attention of the Court was directed solely to the issue of double jeopardy. No question of limitations was before the Court, since the False Claims Act contains its own six-year limitations period. Actually, the language of *Marcus*, as in *Rex Trailer*, not being directed to the issue here involved, was not couched in terms germane to our issue, and should be carefully restricted as authoritative to the narrow questions under review.[16] We feel strongly that the instant case is one of first impression in the Supreme Court and should be decided as such. We commend to this Court the opinion in *Erie Basin*, *supra*, where the Court, in an exhaustive analysis of *Rex Trailer*, concluded that the decision was not a suitable precedent for a Statute of Limitations case. We further urge that the failure of the government to appeal the decision in *Erie Basin* is strongly indicative of its lack of confidence in the argument which it now advances in the instant case.

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[16] Unfortunately, both petitioner and the government concurred in urging certiorari in **Rex Trailer** on the grounds of the conflict between **Witherspoon** and **Weaver** in a situation poorly suited to the resolution of the conflict. (Pet. Br. 6, Resp. Br. 14.) Other than the footnote reference to the "asserted conflict" Mr. Justice Clark made no further comment upon the limitations issue, and confined his attention to the double jeopardy problem.

V. LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT.

In any case where there is raised a question of the purpose or effect of legislation under a given set of facts, the expressed intention of the Congress is frequently the best clue to the proper decision. In the instant case, the applicability of the Statute of Limitations in 28 U. S. C. Sec. 2462 is denied by the government because it claims that no civil fine, penalty or forfeiture is involved. As Mr. Justice Clark pointed out in *Rex Trailer*, there is no significant difference between the relevant provisions of the False Claims Act and the Surplus Property Act.[17] Since the False Claims Act has been considered drastically penal and to provide for civil penalties for almost one hundred years, the inference is inescapable that Section 26(b)(1) is likewise drastically penal and provides for civil penalties.

The Congress enacted a new section, 28 U. S. C. Section 2461, in 1948, which provides as follows:

> "Section 2461. Mode of recovery.
>
> (a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action."

House Report 308, 80th Congress, 1st Session, contains the following revealing expression of the legislative intent in enacting Section 2461:

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[17] **Marcus v. Hess.** " . . . involved a provision of the False Claims Act. R. S. Sec. 5438, 3490, 31 U. S. C. Section 231, essentially the equivalent of Sec. 26(b)(1)."

"Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. *Numerous sections* in the United States code prescribe *civil fines, penalties and pecuniary forfeitures* for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, section 567 of title 12, U. S. C., 1940 ed., Banks and Banking; section 64 of title 14, U. S. C., 1940 ed.; Coast Guard, and Section 180 of title 25, U. S. C., 1940 ed., Indians. Compare Section 1 (21) of Title 49, U. S. C., 1940 ed., Transportation. (Italics added.)

"A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus v. Hess et al.*, 1943, 63 S. T. 379, 317 U. S. 537, 87 L. Ed. 443, rehearing denied 63 S. Ct. 756, 318 U. S. 799, 87 L. Ed. 1163; *Hepner v. United States*, 1909, 29 S. Ct. 474, 213 U. S. 103, 53 L. Ed. 720, and cases cited therein. . . .

"If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5). . . ."

From this language it is apparent that the Congress considered the provisions of the False Claims Act under consideration in *Marcus v. Hess* to provide for "civil fines, penalties and forfeitures," as that language was codified in Sections 2461 and 2462. Without doubt, the Congress intended 2461 and 2462 to apply to statutes similar to that litigated in *Marcus v. Hess* and involving identical pecuniary provisions. In enacting Section 2461 and Section 2462 into Title 28 of the United States Code, the Congress incorporated into those sections the language employed by the

courts time and time again in referring to the financial aspects of 26(b)(1) and its counterparts in similar statutes.[18]

Regardless of the legalistic arguments advanced by the government to establish that the arbitrary sum of $2,000. is "compensatory," or "remedial," we insist that where the Congress uses the identical language employed by the courts to refer to that sum in a long history of decisions —uses the very same words in drafting Sections 2461 and 2462, that use of phraseology in legislation should be conclusive upon the Court. Where the Congress circumscribes the methods, procedures and time for collecting these sums, it matters little what labels or appellations are appended to them, so long as the clearly expressed ideas of Congress as to their collection are respected. If the courts have for years used the generic terms "forfeiture," and "penalty" to refer to the $2,000. figure employed in the False Claims Act and, more recently, in the Surplus Property Act, Contract Settlement Act and others, contemporaneous legislation by the Congress need not withstand argumentative analysis where it employs the identical terminology in its statutes. Further, under the view urged by the government, certain untenable anomalies result.

The False Claims Act has remained virtually unchanged during its entire history, containing its own six-year statute of limitations.[19] This is clearly indicative of Congressional intent that suits under this Act be laid to rest after such a period. If such a general statute remains unaltered for a century, does this not indicate that Congress did not desire the elimination of limitations from its provisions?

And, further, consider the inequities of a condition where liability exists unto eternity if one is pursued under the Surplus Property Act, long after the identical exposure is

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[18] E. g. In **U. S. v. Rohleder**, 157 F. 2d 126 (C. A. 3), the Court of Appeals referred to the $2,000. stipend in the False Claims Act as a "penalty" or "forfeiture" no less than eighteen times.

[19] 31 U. S. C. 235.

quieted under False Claims. To so hold is to render nugatory Section 2462, erasing it for all practical purposes from the rolls.

Of further significance is the fact that the Surplus Property Act, as originally enacted, contained a Suspension of Limitations Section,[20] which was re-enacted and preserved when the Act was recodified into Title 40.[21]

It seems inescapable that the enactment of Sections 2461 and 2462 relating to limitations, coupled with the suspension section enacted in the Surplus Property Act in 1944, is clearly indicative of Congressional intent and understanding that the Contract Settlement Act and the Surplus Property Act, both of which contain provisions identical to those in the False Claims Act under discussion in *Marcus*, are subject to the limitations of actions proscribed by the Congress for the recoveries of civil fines, penalties and forfeitures.[22]

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[20] Section 28 of the Surplus Property Act of 1944, repealed and re-enacted by the Act of June 25, 1948, C. 645; 18 U. S. C. 3287(2).

[21] 40 U. S. C. §489.

[22] "As was provided in the Contract Settlement Act of 1944, the Statute of Limitations, with respect to offenses against the laws of the United States arising with activities under this Act, was suspended until three years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this Act and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under the statute will not be apprehended or investigated until the end of the war, and they will require considerable time until they advance to the stage of litigation." Senate Report No. 1057, 78th Congress, 2d Session.

VI. RECAPITULATION.

The conclusion to be reached, which we submit is the only conclusion which can properly flow from the plain language of the laws under consideration and from the judicial decisions of substance which have preceded and followed these laws for many years, is this:

The Surplus Property Act, like the False Claims Act, contains severe punitive provisions to deter false dealings with the government. These provisions, in addition to prosecution under the criminal section, authorize civil suits for highly punitive recoveries independently of any financial loss which may have been sustained by the government. The obvious purpose of the Congress, in enacting Section 26(b)(1) was to punish those citizens who falsely contract with or deceive the government. There is no doubt that the Congress itself also intended that Sections 2461 and 2462 be applicable to such suits, since it employed the same language used by the courts. Further, the Congress, acting in accordance with this understanding of its own laws, suspended the running of the Statute of Limitations in the Surplus Property Act and enacted a specific section to accomplish that purpose.

It is undeniable that the Congress, in Section 26(b) has provided the executive branch with extraordinary remedies, remedies for which no parallel exists in the private contracts of American citizens with each other.

When the Congress authorized such extraordinary remedies for the purpose of deterring the commission of undesirable practices, it circumscribed the power of the executive branch to enforce these remedies except within a specified period of time.

In this case nothing but the negligence of the government (or, perhaps, its earlier unwillingness and lack of desire) in proceeding timely against these veterans, has

created the problem now before the Supreme Court. These veterans were indicted in 1950. All of the facts were known then and there was no question of wartime pressures or concealment such as might have prevented the timely institution of the civil proceedings.

We submit that the respondent here has failed to pursue its extraordinary remedy within the allotted time, and for this reason we urge that the matter be forever laid to rest.

CONCLUSION.

For the foregoing reasons, the judgment entered below should be reversed.

Respectfully submitted,

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